IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K. HEMA

MONDAY, THE 9TH OCTOBER 2006 / 17TH ASWINA 1928

CRL. A. No. 1701 of 2004

AGAINST THE JUDGEMENT/ORDER IN CRLP. 639/2004 Dated 13/10/2004 ST.181/2003 of CHIEF JUDICIAL MAGISTRATE COURT, PATHANAMTHITTA

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APPELLANT: COMPLAINANT

MANMADAN NAIR, S/O. KRISHNA PILLAI,
LATHEESH BHAVAN, PULLAD MURI, THIRUVALLA.

BY ADV. SRI. P. HARIDAS

RESPONDENTS: STATE & ACCUSED

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1. **STATE OF KERALA REPRESENTED BY**
   PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
   ERNAKULAM.

2. **ABHILASH, S/O. PURUSHAN,**
   NEDUMKALAYIL HOUSE, KURUVANKUZHY,
   PULLAD P.O., THIRUVALLA.

R2 BY ADV. SRI. PHILIP M. VARUGHESE
SRI. V. SETHUNATH
R1 BY PUBLIC PROSECUTOR SRI. C. M. NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO.1701 of 2004

Dated this the 9th day of October, 2006

JUDGMENT

This appeal is filed against the order of acquittal under Section 256 (1) of the Code of Criminal Procedure ('the Code', for short). The complainant was absent and there was no representation on 4.9.2004 and hence the accused was acquitted under Section 256(1) of the Code.

2. On going through the proceeding sheet, it can be seen that the case was taken on file as early as on 6.6.2003 and several postings were given in between, for evidence. The case was posted for evidence to 4.9.2004, on which day, the accused was acquitted for non appearance of the complainant. The question is whether such acquittal is legal or not.

3. A reading of Section 256(1) of the Code shows that an order of acquittal shall be passed by the court, unless the court finds it proper to adjourn the case for hearing to some other day on the two days specified in the section. Those days are: (1) the day appointed for appearance of the accused in court; and (2) any subsequent day thereto to which the case is adjourned for "hearing". Those days fall under Sections 251 and 254 of the Code.

4. But the day on which the accused was acquittal is a day on which the case was posted for "evidence" under Section 254 of the Code and not

for "hearing" referred to in Section 254 of the Code. It is mandatory that this court shall "hear" under Section 254 of the Code and then only proceed to take evidence. Since the case was posted for evidence, the court cannot get jurisdiction to acquit the accused under Section 256(1) of the Code. Therefore, the order of acquittal passed under Section 256(1) of the Code is not legal. The order under challenge is liable to be set aside.

5. Learned counsel for the second respondent placing reliance upon the decision reported in ***State of Kerala v. Sreedharan*** (1964 KLT 309) and ***State v. Mohammed Ibrahim*** (AIR 1959 Ker. 351) advanced an argument that there is lack of averments in the appeal memorandum regarding the cause for non appearance of the complainant and that the complainant ought to have been vigilant in noting down the date correctly. But, the dictum laid down in those decisions can be applied only if the acquittal is made on the two days specified in Section 256(1) of the Code. But the acquittal under Section 256(1) of the Code in this case passed not in the two days specified in Section 256(1) of the Code.

6.Therefore, the absence of averments in the appeal memorandum, if any (in the appeal memorandum itself it is stated that the advocate hearing took a wrong date and that is why both the complainant and counsel were absent) or the laches, if any, on the part of the complainant in noting the correct date etc. will be of no consequence. The dictum laid

down in the said decision cited above cannot be applied to the facts of this case.

7. The order under challenge is set aside. The trial court is directed to take the case on file and dispose of the matter in accordance with law. The parties shall appear before the trial court on 27.11.2006.

The appeal is allowed.

K.HEMA, JUDGE

vgs.